BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants	)	MM Docket No. 95-31

TO: The Commission

COMMENTS OF THE CURATORS OF THE UNIVERSITY OF MISSOURI ON SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

The Curators of the University of Missouri (the "University"), through counsel and pursuant to 47 C.F.R. §§1.415 and 1.419, hereby submit their joint comments in response to the *Second Notice of Proposed Rule Making* (the "*Second NPRM*"), 67 Fed. Reg. 9945 (Feb. 14, 2002), in the above-captioned proceeding. These comments are timely filed under the revised timetable announced in the Order issued by the Deputy Chief of the Media Bureau on Apr. 9, 2002, DA 02-804.

INTRODUCTION

The University operates noncommercial radio stations located in Columbia, St. Louis, Kansas City and Rolla, Missouri as part of its state-chartered educational mission. As a land grant institution, the University uses these facilities both to train students for careers in the media and to provide educational, cultural and informational programming that would otherwise not be available to the residents of the State of Missouri and adjacent areas of nearby states. In addition, the University is an applicant for interim authority to operate the former KFMZ(FM) ("KFMZ"), 98.3 MHz (Channel 252C2), Columbia, Missouri (File No. BIPH-20010724ACJ).

As a major regional operator of noncommercial educational stations ("NCEs") including stations carrying programming from National Public Radio, the University is alarmed that the FCC suggests rules that will hinder the further development of services provided under its public interest mission.

The University is well aware that the Commission faces a regulatory challenge since the Court of Appeals held that NCEs may not be included in any spectrum auctions, insofar as such auctions are now required for all but those channels reserved for NCEs. *National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (the "NPR Case"). Notwithstanding the regulatory challenge posed by the NPR Case, there is no need to respond to this legal dilemma with rules threatening to curtail and, in many cases, eliminate expansion of public interest broadcasting by placing all currently non-reserved channels off-limits to NCEs. The FCC must focus on overcoming the plain technological reality that the number of channels reserved for NCEs is now extremely limited. Therefore, the Commission should avoid any rule that leaves most NCEs no place to expand their public interest broadcasting activities.

In the *Second NPRM*, the Commission has proposed three possible ways to comport FCC rules with the Court of Appeals decision in the NPR Case. Unfortunately, two of these would curtail efforts by the University and similar institutions to expand the reach of their public interest mission in broadcasting. As will be discussed below, these two unsatisfactory proposals would effectively prohibit all but nominal expansion of NCEs public interest broadcasting services by either (1) barring NCEs from open non-reserved channels or (2) only allowing NCEs to receive licenses for such open non-reserved channels when no viable commercial applicant exists. In either instance, with most reserved NCE channels already licensed, and the continuing interest of commercial entities in any available frequency able to serve all but the smallest

audiences, NCE service would effectively be frozen at its current level. Such a development would not be in the public interest.

In the face of these proposals, the University has immediate concerns that the rules ultimately arising from the *Second NPRM* will adversely affect its application to permanently operate the former KFMZ(FM), 98.3 MHz (Channel 252C2), Columbia, Missouri (File No. BIPH-20010724ACJ) (the "Former Rice Station" or "KFMZ"). As discussed below, the process of replacing the former owner, Michael Rice's organization, has been ongoing now for almost a year; the Columbia community has been deprived of any service on the KFMZ frequency since October 3, 2001.[1] Although the NPR Case should have no effect on the selection of an interim operator as no auctions are required to grant such temporary authority, the University is concerned that it will be excluded from any auction for a permanent license – to the detriment of its public interest broadcasting mission. Therefore, the Commission should avoid imposing any rule through the *Second NPRM* that would effectively eliminate NCEs from consideration as a permanent replacement for the Rice Station.

The Commission can achieve this goal of supporting public interest broadcasting by either (a) adopting a rule in response to the NPR Case that does not automatically prevent virtually all NCEs from obtaining licenses for open non-reserved frequencies, or (b) by explicitly recognizing that the proceeding to license a new operator for the former Rice Station presents a special case; therefore, as a matter both of equity and of the Commission's inherent power to act in the public interest, the Commission should grant a license for the Former Rice Station under a

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1 *See In the Matter of Michael S. Rice and his wholly-owned companies,* 16 FCC Rcd 18394 (2001).

sui generis procedure that does not exclude NCEs – a procedure distinct from those that will apply in typical Commission licensing procedures. In this way, the Commission will be able to act expeditiously to return service on the Former Rice station in a way that best serves the public interest.

ARGUMENT

I. The Commission Should Not Hinder the Growth of Public Interest Broadcasting by NCEs By Promulgating Rules that Segregate NCEs, Making Them Ineligible for Most Currently Available Channels

NCE stations have become victims of their own success. As the public increasingly turns to stations that operate under a public interest mission rather than a profit motive,[2] more NCE stations have been created. Unfortunately, this has also meant that the limited number of channels reserved for NCEs have become jammed. In many markets, all available NCE FM frequencies are taken. The few that remain are rapidly filling. In response to this shortage, an increasing number of NCEs have sought licenses for non-reserved channels as the only means to effectuate and expand their public interest services.

However, efforts to meet the increasing public desire and need for NCEs are threatened by at least two of the FCC's proposals to comport its regulations with the statutory problems identified by the D.C. Circuit in the NPR Case. First, the Commission's proposed "Option #1", to "[h]old NCE entities ineligible for licenses for non-reserved channels and frequencies,"[3] would certainly shut down efforts to expand NCE broadcasting in much of the country as the

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2 *See* Mike Janssen, *NPR lands most listeners ever*, Current – The Public Telecommunications Newspaper, Mar. 25, 2002, at 1 (noting a 19 percent weekly increase in Arbitron-measured "cume" over a year's time).

3 *Second NPRM* at ¶11.

reserved spectrum is already full and the only option for the growth of public interest broadcasting by NCEs is to obtain licenses for non-reserved channels.[4] Given the public's increasing hunger for the kind of public interest broadcasting that NCEs provide, the near total shutdown of NCE expansion under Option #1 would harm the public and should not be adopted.

Although *slightly* less onerous to public interest broadcasters, the Commission still proposes to shut down almost all expansion by public interest NCE stations through "Option #2," as it would only "[p]ermit NCE entities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities."[5] Although the Commission proposes a paper procedure that might give NCE applicants a chance to obtain licenses for non-reserved channels and frequencies, the Commission itself notes "there would be little incentive for the commercial applicant to try to settle or reach an engineering solution . . . "[6] when applications are mutually exclusive. This would be true even if the Commission amends its anti-collusion rules to encourage such negotiations. It is a rare channel or frequency that is so unattractive that no commercial broadcaster would not want to obtain a license for it, especially in this era of consolidation when formerly unattractive allotments have greater economic value as part of a regional programming and/or advertising package.[7] Therefore, Option #2 would effectively close the door to an expansion of public interest broadcasting by NCEs in almost all

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4 *See, generally, Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* 65 Fed. Reg. 36375 (Apr. 4, 2000), at ¶¶ 112-115 ("Report and Order").

5 *Second NPRM* at ¶12.

6 *Second NPRM* at ¶13.

7 A good example is Clear Channel's hub and spoke system, in which centrally produced programs, including local news from a distant central newsroom, have replaced purely local programming efforts.

instances, even though it appears to leave an opportunity – now or then – for NCEs to operate on non-reserved frequencies.

Insofar as they effectively eliminate the much desired increase in public interest broadcasting by NCEs, the Commission would not be meeting its own public interest obligations were it to adopt either Option #1 or Option #2 as either a rule or a policy.

II. The Commission Should Allow Conversion of Vacant Non-Reserved Channels so They Can Be Reserved for NCE Use Without the Need for Auction

The Commission's proposed "Option #3" to "[p]rovide NCE entities additional opportunities to reserve channels in the Table of Allotments"[8] would help overcome some of the inherent limitations imposed on public interest broadcasting by the NPR Case. The Commission already has policies and rules in place to reserve new allotments for NCE use[9] when NCEs are able to meet a two-part test.[10] But, as the Commission correctly notes, these regulations do not assist NCEs when seeking a license for an existing but vacant unreserved allotment.[11]

The FCC, however, should close this gap – and apply these same principles so that NCEs, such as the University, may demonstrate the public interest in reclassifying vacant unreserved allotments into channels reserved for NCE use, such as the one previously licensed to the Former Rice Station. Insofar as this procedure withstood judicial scrutiny in the NPR Case, the FCC's

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8 *Second NPRM* at ¶15.

9 *See id.* and *Report and Order*, *supra* n.3, at ¶¶114-115.

10 "(A) the NCE radio proponent is technically precluded from using the reserved band by existing stations or previously filed applications or an NCE television proponent shows that there is no reserved channel assigned to the community; and (B) the NCE proponent would provide a first or second radio or television NCE service to 10% of the population within the proposed allocation's 60 dBu (1 mV/m) service contour (radio) or Grade B contour (TV)." *Report and Order*, *supra* n. 3, at ¶114.

11 *Second NPRM* at ¶17.

underlying policy motive, "to mitigate any potential hardship that the auction process might impose on noncommercial entities," remains valid today just as it was before the NPR Case. Indeed, the policy imperative is more pressing because the NPR Case, by barring even well-endowed NCEs from broadcast spectrum auctions, makes it more difficult for NCEs to find frequencies to initiate or expand their public service broadcasting activities. Therefore, to maintain its policy objective in the face of such increased hardship, the Commission should expand the relief previously granted to NCEs by applying the same proven criteria for reserving new allotments to the conversion of existing but vacant unreserved allotments to NCE status.

In the University's case, the equities militate for such an outcome as it has a longstanding interim application in place for the Former Rice Station's frequency. Without a rule allowing it to demonstrate the public interest in converting the former Rice Station's unreserved channel to a reserved frequency, the University would be barred from ever receiving a permanent license for this channel– even if it is granted interim authority to operate the Former Rice Station. Such an outcome would run counter to the Commission's policy of granting relief to NCEs and, therefore, fails to support the public interest already enumerated by the Commission in the *Report and Order*.

III. Licensing a New Owner for the Former Rice Station Presents Unique Facts and Circumstances Militating for Special Procedures Limited to the Facts of the Case

The FCC has yet to announce an auction date for all of the FM licenses previously controlled by Michael Rice. History instructs that the applicants for an interim license will likely also apply for a permanent license. However, given the serious allegations raised about the

fitness of most other applicants for interim authority to operate the Former Rice Station,[12] it is not unreasonable to expect the Commission will spend many months, if not years, on pleadings and hearings before ultimately selecting an interim licensee. Given the serious loss of service created by so lengthy a process, it would serve the public interest in returning service to the community permanently for the Commission to establish a special procedure applicable only to the unprecedented situation presented by the Former Rice Station.

Moreover, under auction procedures, litigation appears likely to keep the former Rice Station's frequency silent for even longer than under the normal process; one of the entities either associated with or including Michael Rice could make the highest bid, leading to years of litigation as these relationships allow others to challenge the high bidder's character qualifications. Petitions to deny would likely ensue, and the Commission, having rebuffed Mr. Rice's previous attempts to maintain his licenses, would conceivably grant the petition to deny, which would then lead to a court appeal. While the court appeal is pending, the Commission would then be obliged to hold another auction, excluding any party found "unfit" following the first auction. But the winning party from the first auction is likely to challenge the grant arising from the second auction. This scenario, and all the permutations that an auction proceeding here might create, represent a blueprint for long-term litigation and continued radio silence.

To prevent such prolonged loss of service to the Columbia community, the Commission should instead effectuate a special procedure with the shortest legal deadlines possible so that it

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12 *E.g.,* pleadings filed with FCC allege that two of the applicants have maintained close ties to or include Michael Rice, that one application poses potential multiple ownership and market concentration concerns, while another applicant has been accused of falsely representing the availability of antenna facilities.

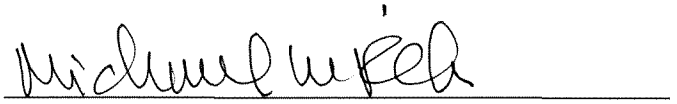
can expeditiously select a permanent license through a *sui generis* process. Given the unprecedented situation presented by the need to restore service on the Former Rice Station's frequency, the Commission should proceed to put this *sui generis* procedure in place under its inherent public interest and equity powers.

Failing in this effort, the Commission should initiate a new Rule Making to craft this kind of *sui generis* procedure so that it can expeditiously select a permanent licensee in light of the court findings in the NPR Case.

CONCLUSION

For all the aforementioned reasons, the University respectfully requests that the Commission impose no rule or policy that will make it impossible for NCEs to commence or expand their public interest broadcasting services as a result of the auction limitations imposed by the NPR Case. In pursuit of this goal, the Commission should adopt the solutions proposed. Moreover, the Commission should create a specialized *sui generis* process, as described, to choose the licensee best suited to replace the Former Rice Station in Columbia, Missouri.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2002, a true and correct copy of the foregoing COMMENTS OF THE CURATORS OF THE UNIVERSITY OF MISSOURI was sent by postage prepaid, first-class mail, unless otherwise indicated, to the following:

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